IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Kevin Moitoso, Tim Lewis, Mary Lee Torline, and Sheryl Arndt, individually and as representatives of a class of similarly situated persons, and on behalf of the Fidelity Retirement Savings Plan,

Plaintiffs,

v.

FMR LLC, the FMR LLC Funded Benefits Investment Committee, the FMR LLC Retirement Committee, Fidelity Management & Research Company, FMR Co., Inc., and Fidelity Investments Institutional Operations Company, Inc.,

Defendants.

Case No. 1:18-cv-12122-WGY

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

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INTRODUCTION

On July 9, 2020, this Court preliminarily approved the Parties' Class Action Settlement Agreement, which resolves Plaintiffs' claims against Defendants under the Employee Retirement Income Security Act ("ERISA") relating to the Fidelity Retirement Savings Plan (the "Plan").[1] *ECF No. 250*. The Court found on a preliminary basis that "the Settlement Agreement is fair, reasonable, and adequate, and within the range of possible approval," and approved the distribution of the Notices of Settlement as specified in the Settlement Agreement. *Id. ¶¶ 2, 8.* Since that time, an Independent Fiduciary has confirmed that the Settlement terms are reasonable, *see Declaration of Kai Richter in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement ("Third Richter Decl.") Ex. A*, and only one Class Member (out of 41,281) has objected to the Settlement. *Id. ¶ 4*. That lone objection does not relate to the merits of the Settlement.[2] Accordingly, Plaintiffs respectfully request that the Court grant final approval of the Settlement.

BACKGROUND

I. PROCEDURAL HISTORY

A. Pleadings

Plaintiffs filed this action on October 10, 2018, alleging that FMR LLC and related entities breached their fiduciary duties of prudence and loyalty under ERISA with respect to the Plan's investment lineup and by failing to secure revenue sharing rebates for Plan participants. *See ECF*

[1] The Defendants are FMR LLC, the FMR LLC Funded Benefits Investment Committee ("FBIC"), the FMR LLC Retirement Committee ("Retirement Committee"), Fidelity Management & Research Company, FMR Co., Inc., and Fidelity Investments Institutional Operations Company, Inc. (collectively "Fidelity" or "Defendants"). Unless otherwise specified, all capitalized terms have the meaning assigned to them in Article 1 of the Parties' Settlement Agreement, which appears on the docket at ECF No. 243-01.

[2] The objection is based solely on the fact that "there is no opt-out option" under the Settlement. *Third Richter Decl. Ex. B.* However, because the class was certified under Rule 23(b)(1), *see ECF No. 83 at ¶¶ 8-9*, no such opt-out option exists. *See, e.g.*, *Roy v. FedEx Ground Package Sys., Inc.*, 353 F. Supp. 3d 43, 59 n.6 (D. Mass. 2018) ("under Fed. R. Civ. P. 23(b)(1) … membership in the class is 'mandatory' and 'the Rule provides no opportunity for (b)(1) … members to opt out ....'") (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362 (2011)).

No. 1.[3] On November 9, 2018, Plaintiffs filed an Amended Complaint that added a prohibited transaction claim under 29 U.S.C. § 1106(b)(3) and certain supporting allegations. *ECF No. 31*. On January 10, 2019, Plaintiffs filed a Second Amended Complaint ("SAC"), *ECF No. 37*, which (1) included a new allegation that "the Plan Fiduciaries failed to prudently monitor and control the Plan's recordkeeping expenses," *id. ¶ 12*; (2) alleged that the "Revenue Credits" that Fidelity makes available to current employees under the Plan (which approximate the amount of fees paid to Fidelity in each Plan year) are not made available to former employees, *id. ¶ 15*; (3) revised the class definition to include only former employees who participated in the Plan, *id. ¶ 137*; (4) added the FBIC as a defendant; and (5) added Strategic Advisors, Inc. ("SAI") as a defendant and added certain other claims.[4] On March 25, 2019, Plaintiffs filed a Third Amended Complaint which added Sheryl Arndt as a class representative. *ECF No. 56.* Finally, on May 2, 2019, Plaintiffs filed a Fourth Amended Complaint that removed some of the new claims and removed SAI as a defendant.[5] The Fourth Amended Complaint remains the operative complaint, and Defendants filed an Answer to that complaint on May 16, 2019. *ECF No. 88*.

B. Court Proceedings

On May 2, 2019, the Parties filed a Stipulation and Proposed Order for class certification, *ECF No. 78*, which the Court adopted on May 7, 2019. *ECF No. 83*. The Parties then filed cross-motions for summary judgment on September 6, 2019. *See ECF Nos. 135, 139.* On November 5, 2019, the Parties sent a joint letter to the Court requesting that, if summary judgment was not dispositive of the pending issues presented on summary judgment, those issues could be resolved

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[3] Plaintiffs also asserted a claim against FMR LLC for allegedly failing to monitor Plan fiduciaries, and an equitable claim under 29 U.S.C. § 1132(a)(3).

[4] The SAC added a claim for breach of the duty of impartiality (Count II), a disclosure claim (Count III), and a claim regarding the management of the Portfolio Advisory Service at Work ("PAS-W") managed account program (Count IV).

[5] Specifically, Plaintiffs removed the disclosure claim and the claim related to the management of the PAS-W program. *ECF No. 77.*

on a "case-stated" basis. On November 7, 2019, the Court held a summary judgment hearing in which it agreed to the parties' proposed case-stated procedure. *ECF No. 216*.

On November 20, 2019, the Court held a case stated hearing. *ECF No. 222*. The Court then issued its Case Stated Order on March 27, 2020. *ECF No. 224.* In summary, the Court ruled that Fidelity breached its duty of prudence by failing to monitor the recordkeeping expenses incurred by former employees and failing to monitor certain mutual funds available in the Plan, but Fidelity did not breach its duty of prudence by failing to investigate alternatives to mutual funds, did not breach its duty of loyalty, and did not engage in prohibited transactions. *ECF No. 224* at 4. The Court further held that FMR LLC was liable for breach of its duty to monitor other Plan fiduciaries. *Id.* However, the Court's Case Stated Order addressed only the question of breach, not causation or loss, and did not address Fidelity's statute of limitations defense. *Id.* at 66.

On April 17, 2020, the Parties filed a Joint Stipulation in which Defendants voluntarily withdrew and dismissed their statute of limitations defense with respect to all remaining claims, and Plaintiffs waived their right to appeal the Court's Case Stated Order as to their prohibited transaction claim. *ECF No. 226*. For the remaining issues of causation and loss on the monitoring claims, the Court set a trial date of July 6, 2020. *ECF No. 232*. Following the Court's Case Stated Order, the Parties engaged in direct negotiations and reached a settlement-in-principle in June 2020. *See ECF No. 240.* The terms of the Settlement are memorialized in the Settlement Agreement that has been preliminarily approved by the Court. *See ECF Nos. 243-01, 250.*

II. SETTLEMENT TERMS

A. The Class

The Settlement Agreement applies to the following Class, which tracks the class certified by the Court under Rule 23(b)(1) in its prior Class Certification Order (*ECF No. 83*):

> [A]ll participants and beneficiaries of the FMR LLC Profit Sharing Plan or the Fidelity Retirement Savings Plan who, during the Class Period, (1) remained Plan participants or beneficiaries for any length of time, (2) ceased to be employed by a participating employer before or during the period of time that they remained in the Plan, and (3) did not receive any portion of the mandatory revenue credit contributed to the FMR LLC Retirement Savings Plan pursuant to § 5.1(e) of the 2014 Restatement of the Plan (as amended) and §1.12(b)(3) of the 2017 Adoption Agreement for use with the Fidelity Basic Plan Document No. 17 for the Plan (as amended) issued by FMR LLC in any Plan year or portion of a Plan year in which they maintained a Plan account balance and were no longer employed by a participating employer. Excluded from the class are Individual Board Members and Individual Committee Members.

Settlement Agreement (ECF No. 243-01) ¶ 1.11. There are 41,281 Class Members. *See infra* at 6.

B. Monetary Relief

Under the Settlement, Fidelity will cause its insurers to contribute a Gross Settlement Amount of $28.5 million to a common settlement fund (the "Settlement Fund"). *Settlement Agreement ¶¶ 1.31, 4.1, 4.2.* After accounting for any Attorneys' Fees and Costs, Administrative Expenses, and class representative Service Awards approved by the Court, the Net Settlement Amount will then be distributed to eligible Class Members. *Id. ¶¶ 5.2-5.3.*

The Net Settlement Amount will be allocated among eligible Class Members in proportion to their average quarterly account balances in the Plan. *Id. ¶ 5.1 (b), (c).* The Plan accounts of Participant Class Members who are currently enrolled in the Plan will be automatically credited with their share of the Settlement Fund. *Id. ¶ 5.2.* Former Participant Class Members who no longer have a Plan account will be required to submit a claim form, which allows them to elect to have their distribution rolled over into an individual retirement account or other eligible employer plan, or to receive a check. *Id. ¶¶ 5.1, 5.3.*[6] Under no circumstances will any monies revert to Fidelity. Any checks that are uncashed will revert to the Qualified Settlement Fund and will be paid to a *cy pres* to be mutually agreed upon by the parties. *Id. ¶ 5.6(b).*

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[6] The Claim Form also allows the Settlement Administrator to verify the addresses of Class Members who are sent checks. This is important because all of the Class Members are former employees, and Former Participant Class Members are no longer affiliated with the Plan.

C. Prospective Relief

In addition to the foregoing monetary relief, the Settlement also provides that the following procedures shall apply to the management of the Plan on a prospective basis beginning no later than 30 days after the Settlement Effective Date:

(a) One or more Plan fiduciaries will undertake to monitor Plan recordkeeping fees; and

(b) One or more Plan fiduciaries will undertake to monitor the Plan's investment options, other than any investments available through the Plan's self-directed brokerage account.

Settlement Agreement ¶ 6.1.

D. Release of Claims

In exchange for this relief, the Class will release Defendants and affiliated persons and entities (the "Released Parties" as defined in ¶ 1.50 of the Settlement Agreement) from all claims:

1.42(a) That in any way arise out of, relate to, are based on, or have any connection with any of the allegations, acts, omissions, purported conflicts, representations, misrepresentations, facts, events, matters, transactions or occurrences that were asserted or could have been asserted in the Action . . . .;[7]

1.42(b) that would be barred by res judicata based on the Court's entry of the Final Approval Order;

1.42(c) that arise from the direction to calculate, the calculation of, and/or the method or manner of the allocation of the Net Settlement Fund pursuant to the Plan Of Allocation; or

1.42(d) that arise from the approval by the Independent Fiduciary of the Settlement Agreement.

Id. ¶ 1.42. The release carves out claims "to enforce the Settlement Agreement" and for "individual claims for denial of benefits from the Plan." *Id.*

III. PRELIMINARY APPROVAL OF SETTLEMENT

Plaintiffs filed a motion seeking preliminary approval of the Settlement on July 2, 2020.

[7] The release language has been truncated due to space limitations. The full release language, incorporated by reference, is in the Settlement Agreement, ¶ 1.42.

ECF No. 242. The Court granted that motion on July 9, 2020. *ECF No. 250.* In its Order, the Court found on a preliminary basis that "the Settlement Agreement is fair, reasonable, and adequate, and within the range of possible approval...." *Id. ¶ 2.* The Court also approved the distribution of the Notices of Settlement specified in the Settlement Agreement, and appointed Analytics Consulting, LLC ("Analytics") to serve as the Settlement Administrator. *Id. ¶¶ 7-8.*

IV. NOTICE AND REACTION TO SETTLEMENT

Pursuant to the Court's Order preliminarily approving the Settlement, Analytics mailed the approved Notice (and Former Participant Class Member Claim Form, if applicable) to each of the Class members identified by the Plan's recordkeeper. *See Declaration of Jeffrey Mitchell ("Mitchell Decl."), ¶¶ 7-10.*[8] In total, 41,281 Notices were mailed, including 20,624 Notices to Participant Class Members and 20,657 Notices to Former Participant Class Members. *Id. ¶ 9.*

Prior to sending these Notices, Analytics cross-referenced the addresses on the class list with the United States Postal Service National Change of Address Database. *Id. ¶ 8.* In the event that any Notices were returned, Analytics re-mailed the Notice to any forwarding address that was provided and performed a skip trace in an attempt to ascertain a valid address for the Class Member in the absence of a forwarding address. *Id. ¶ 12.* As a result, the notice program was very effective. Out of 41,281 Notices that were mailed, only approximately 1.96% were ultimately undeliverable despite these efforts. *Id. ¶ 13.*

In the event that any Class Members desired further information, Analytics established a settlement website at www.fidelityplansettlement.com. *Id. ¶ 14.* Among other things, the Settlement Website included: (1) a "Frequently Asked Questions" page containing a clear

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[8] Analytics also mailed CAFA Notices to the Attorneys General of each U.S. state and territory identified by Defendants as proper recipients, as well as the Attorney General of the United States, pursuant to 28 U.S.C. § 1715. *Mitchell Decl. ¶ 6.*

summary of essential case information; (2) a "Home" page and "Important Dates" page, each containing clear notice of applicable deadlines; (3) an "Important Case Documents" page, which includes case and settlement documents for download (including the Fourth Amended Complaint, Participant Notice, Former Participant Notice, Former Participant Claim Form, and Settlement Agreement); and (4) email, phone, and U.S. mail contact information for Analytics. *Id.* In addition, Analytics created and maintained a toll-free telephone support line (1-844-954-1984) as a resource for Class Members seeking information about the Settlement. *Id. ¶ 15*. This telephone number was referenced in the Notices, and also appears on the Settlement Website. *Id.*

The deadline to submit objections to the Settlement was December 22, 2020. *ECF No. 250 at ¶ 9.* That deadline has passed, and there has been only one objection to the Settlement. *See Third Richter Decl. ¶ 4 & Ex. B*; *Mitchell Decl. ¶ 16.* That objection does not relate to the merits of the Settlement, and is addressed below. *See infra* at 17.

V. REVIEW AND APPROVAL BY INDEPENDENT FIDUCIARY

Pursuant to Paragraph 2.2 of the Settlement Agreement and applicable ERISA regulations,[9] the Settlement was submitted to an Independent Fiduciary (Fiduciary Counselors, Inc.) for review following the Court's preliminary approval order. *See Third Richter Decl. Ex. A*. After reviewing the Settlement and other case documents, and interviewing counsel for each of the Parties, the Independent Fiduciary concluded that: (1) "The Settlement terms, including the scope of the release of claims, the amount of cash received by the Plan, the non-monetary consideration and the amount of any attorneys' fee award or any other sums to be paid from the recovery, are reasonable in light of the Plan's likelihood of full recovery, the risks and costs of litigation, and the value of claims forgone"; (2) "The terms and conditions of the transaction are no less favorable

[9] *See* Prohibited Transaction Exemption 2003-39, 68 Fed. Reg. 75632, as amended, 75 Fed. Reg. 33830.

to the Plan than comparable arm's-length terms and conditions that would have been agreed to by unrelated parties under similar circumstances"; and (3) "The transaction is not part of an agreement, arrangement or understanding designed to benefit a party in interest." *Id.* at 1. Accordingly, the Independent Fiduciary "approve[d] and authorize[d] the Settlement on behalf of the Plan in accordance with Prohibited Transaction Exemption 2003-39 ("PTE 2003-39")." *Id.*

ARGUMENT

I. LEGAL STANDARD

Federal Rule of Civil Procedure 23(e) requires judicial approval of any settlement agreement that will bind absent class members. The Court "enjoys considerable range in approving or disapproving a class settlement." *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 32-33 (1st Cir. 2009) (quotation omitted). However, there is a "strong public policy in favor of settlements, particularly in very complex" cases such as this. *Puerto Rico Dairy Farmers Ass'n v. Pagan*, 748 F.3d 13, 20 (1st Cir. 2014) (quotation omitted); *see also In re Pharm.*, 588 F.3d at 36 (discussing policy favoring settlements in "hard-fought, complex class action[s]"). "Approval is to be given if a settlement is untainted by collusion and is fair, adequate, and reasonable." *In re Lupron Mktg. & Sales Practices Litig.*, 228 F.R.D. 75, 93 (D. Mass. 2005).[10]

Federal Rule of Civil Procedure 23(e)(2), as amended (effective December 2018), identifies four factors considered in making such determination: (1) adequacy of representation, (2) existence of arm's-length negotiations, (3) adequacy of relief, and (4) equitableness of treatment of class members. Fed. R. Civ. P. 23(e)(2). These factors overlap significantly with the more detailed list of factors that courts in this Circuit have typically used for purposes of reviewing

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[10] There is a presumption in favor of settlement approval where (as in this case) the parties have negotiated at arms-length and conducted meaningful discovery. *See Roberts v. TJX Companies, Inc.*, 2016 WL 8677312, at *5 (D. Mass. Sept. 30, 2016) (citing *In re Tyco Int'l, Ltd. Multidistrict Litig.*, 535 F. Supp. 2d 249, 259 (D.N.H. 2007); *City P'ship Co. v. Atl. Acquisition Ltd. P'ship*, 100 F.3d 1041, 1043 (1st Cir. 1996)).

a proposed class action settlement (the "*Grinnell* factors"): (1) the complexity, expense, and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all of the attendant risks of litigation. *Roberts*, 2016 WL 8677312, at *6 (citing *City of Detroit v. Grinnell Corp.*, 495 F.3d 448, 463 (2d Cir. 1974));[11] *see also Berni v. Barilla G. e R. Fratelli, S.p.A.*, 332 F.R.D. 14, 23 (E.D.N.Y. 2019), *vacated and remanded on other grounds*, 964 F.3d 141 (2d Cir. 2020) (recognizing that amended Rule 23(e)(2) criteria "overlap almost entirely" with the *Grinnell* factors). "The goal of [the] amendment is not to displace any [existing] factor, but rather to focus the court … on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." Fed. R. Civ. P. 23(e) advisory committee note (2018). As discussed below, both the factors in Rule 23(e)(2) and the *Grinnell* factors overwhelmingly favor approval of the Settlement.

II. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE

A. The Recovery Is Substantial and Will Be Distributed Equitably

As the Independent Fiduciary noted in its Report, the recovery provided by the Settlement "[is] reasonable in light of the Plan's likelihood of full recovery, the risks and costs of litigation,

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[11] Although the First Circuit has not explicitly adopted the *Grinnell* factors, numerous district courts in the First Circuit use the *Grinnell* factors to guide their analysis at the final approval stage. *See Hill v. State St. Corp.*, 2015 WL 127728, at *6 (D. Mass. Jan. 8, 2015); *New England Carpenters Health Benef. Fund v. First Databank, Inc.*, 602 F. Supp. 2d 277, 280-81 (D. Mass. 2009); *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 72 (D. Mass. 2005); *In re Lupron*, 228 F.R.D. at 93-94; *In re StockerYale, Inc. Sec. Litig.*, 2007 WL 4589772, at *3 (D.N.H. Dec. 18, 2007). Courts have continued to use the *Grinnell* factors following the amendments to Rule 23 in assessing whether a settlement is "fair, reasonable, and adequate." *See In re Namenda Direct Purchaser Antitrust Litig.*, 462 F. Supp. 3d 307, 309 (S.D.N.Y. 2020) ("[C]ourts … use [the *Grinnell* factors] in tandem with Rule 23 to determine a class settlement warrants final approval.").

and the value of claims foregone." *Third Richter Decl. Ex. A at 1.* The $28.5 million Gross Settlement Amount is substantial in relation to other ERISA 401(k) settlements. *See Declaration of Kai Richter in Support of Preliminary Approval of Class Action Settlement ("First Richter Decl."), ECF No. 243, ¶ 6.* By comparison, the ERISA settlements that this Court approved in *Putnam* and *Eaton Vance* were $12.5 million and $3.45 million, respectively. *See Putnam*, No. 1:15-cv-13825, ECF No. 220 (Apr. 29, 2020); *Price v. Eaton Vance Corp.*, No. 18-12098, ECF No. 45 (D. Mass. May 22, 2019).

The recovery also measures favorably based on other metrics. For example, the monetary relief ($28.5 million) represents approximately 1.11% of Class Members' assets in the Plan's "Open Architecture Window" exclusive of PAS-W ($2.567 billion) which were the assets upon which Plaintiffs' remaining claims were focused as of the point when the settlement was negotiated.[12] *See ECF No. 125-2 (Strombom Expert Report) at 70.* Even if PAS-W assets are included, the settlement amount still represents 0.76% of assets, *id.*, which also falls within the range of other recent 401(k) settlements. *See First Richter Decl. ¶ 6.*

The settlement amount also represents a significant portion of the Class's alleged damages. Based on the most recent calculations of Plaintiffs' damages expert, Dr. Steve Pomerantz, the $28.5 million recovery constitutes approximately 84% of the Class's alleged damages due to failure to monitor recordkeeping expenses ($33.9 million), and a full recovery based on the raw amount of the damages for that claim ($27.97 million) before any present value adjustment. *See Supplemental Expert Report of Steve Pomerantz (June 3, 2020), ECF No. 243-02,* ¶ 13. Although

[12] Plaintiffs had already withdrawn their claims relating to PAS-W at the time of the Settlement and stipulated that they would "not seek to recover losses or other monetary relief for assets of the [] Plan invested through the [] PAS-W managed account option." *ECF No. 229*. Plaintiffs also stated in connection with their summary judgment briefing that they "ma[d]e no claim relating to the Freedom Funds". *ECF No. 154 at 14*.

Plaintiffs also alleged damages in connection with the failure to monitor certain Fidelity mutual funds, Dr. Pomerantz stated in his original expert report that there was a partial "overlap" between the damages associated with a failure to monitor recordkeeping fees and the damages related to the failure to monitor certain Fidelity mutual funds. *See Expert Report of Steve Pomerantz, ECF No. 131-01, ¶ 141*. Even disregarding this overlap, the $28.5 million recovery represents approximately 29.2% of the total estimated damages (both damages associated with a failure to monitor recordkeeping fees and damages related to the failure to monitor certain Fidelity mutual funds), and an even higher percentage if the overlap is considered. *Id.* This recovery also compares favorably to other class action settlements: by comparison, the recovery in *Eaton Vance* was 23% of estimated damages, and the recovery percentage in *Putnam* was 28%. *See Eaton Vance*, No. 18-12098, ECF No. 32, at 12 (D. Mass. May 6, 2019); *Putnam*, No. 1:15-cv-13825, ECF No. 214 at 12; *see also Urakhchin v. Allianz Asset Mgmt. of Am., L.P.*, No. 8:15-cv-01614, ECF No. 185, at 3, 7 (C.D. Cal. July 30, 2018) (approving $12 million ERISA 401(k) settlement that represented approximately one-quarter of estimated total plan-wide losses of $47 million); *Johnson v. Fujitsu Tech. & Business of America, Inc.*, 2018 WL 2183253, at *5-6 (N.D. Cal. May 11, 2018) (approving $14 million ERISA 401(k) settlement that represented "just under 10% of the Plaintiffs' most aggressive 'all in' measure of damages"); *Hochstadt v. Bos. Sci. Corp.*, 708 F. Supp. 2d 95, 109 (D. Mass. 2010) (recovery of approximately 27% of conservatively estimated damages was "plainly reasonable").

The Settlement also treats Class Members equitably and will be delivered through an effective method of distribution. The Net Settlement Amount will be allocated among all eligible Class Members on a *pro rata* basis in proportion to their average quarterly account balances in the Plan during the Class Period. *Settlement Agreement ¶ 5.1(b), (c)*. Notably, the recordkeeping fees

that Plaintiffs challenged in the case were assessed as a percentage of assets. Participant Class Members will have their accounts automatically credited with their share of the Settlement Fund. *Id. ¶ 5.2.* Although Former Participant Class Members are required to submit a Former Participant Class Member Claim Form for administrative reasons—to specify a cash payment or rollover election and to verify their current address—they are entitled to the same proportional share of the Settlement. *Id. ¶ 5.3.* This method of distribution has been approved in similar ERISA class action settlements, including the *Velazquez* case in this District. *See, e.g.*, *Velazquez v. Mass. Fin. Services Co.*, No. 17-cv-11249, ECF No. 91-1 at ¶¶ 2.6, 6.1, 6.6 (D. Mass. June 14, 2019); *Sims v. BB&T Corp.*, No. 1:15-cv-732, ECF No. 437 at 3-4 (M.D.N.C. Nov. 30, 2018).

Finally, in addition to monetary compensation, the Settlement provides for prospective relief. *First Richter Decl. ¶ 8.* As noted above, the Settlement provides that the following procedures shall apply to the management of the Plan on a prospective basis beginning no later than 30 days after the Settlement Effective Date:

(a) One or more Plan fiduciaries will undertake to monitor Plan recordkeeping fees; and

(b) One or more Plan fiduciaries will undertake to monitor the Plan's investment options, other than any investments available through the Plan's self-directed brokerage account.

Settlement Agreement ¶ 6.1. This prospective relief addresses the core issues raised in this lawsuit: Fidelity's "fail[ure] to monitor proprietary funds other than the two DIAs, and … fail[ure] to monitor recordkeeping expenses." *ECF No. 224* at 66. This prospective relief further supports settlement approval. *See Bezdek v. Vibram USA Inc.*, 79 F. Supp. 3d 324, 346-47 (D. Mass. 2015), *aff'd*, 809 F.3d 78 (1st Cir. 2015) (prospective relief is "a valuable contribution" to a settlement).[13]

[13] *See also Nilsen v. York Cty.*, 400 F. Supp. 2d 266, 284 (D. Me. 2005) (prospective relief benefitting class members supports settlement); *Marcoux v. Szwed*, 2017 WL 679150, at *3 (D. Me. Feb. 21, 2017) (same).

B. Continued Litigation Would Have Entailed Significant Risk

In the absence of a Settlement, Plaintiffs would have faced significant litigation risk. *See Hill*, 2015 WL 127728, at *10 (noting that the risk of continued litigation includes the risk that there could "be no recovery at all"); *In re Lupron*, 228 F.R.D. at 97 ("As any experienced lawyer knows, a significant element of risk adheres to any litigation taken to binary adjudication."). Plaintiffs lost their claims that Fidelity breached its duty of prudence by failing to investigate alternatives to mutual funds, breached its duty of loyalty, and engaged in prohibited transactions on the case stated record. *ECF No. 224 at 4*. And even on the issues that the Court found in Plaintiffs' favor, it expressly noted that its decision "addresse[d] only the question of liability, not causation or loss." *Id.* at 66. Thus, it is uncertain whether Plaintiffs ultimately would have prevailed. In two other recent trials involving defined contribution plans, the defendants were the prevailing party. *See Wildman v. Am. Century Servs., LLC*, 362 F. Supp. 3d 685, 711 (W.D. Mo. 2019); *Sacerdote v. New York Univ.*, 328 F. Supp. 3d 273 (S.D.N.Y. 2018).[14]

With respect to losses attributable to the failure to monitor investments, the First Circuit noted in *Putnam* that there were "questions of fact" regarding whether the plaintiffs' expert (Dr. Pomerantz) had "picked suitable benchmarks, or calculated the returns correctly, or focused on the correct time period." *Putnam*, 907 F.3d at 34. These questions loomed large in this case, as Fidelity filed both a Daubert motion with respect to Dr. Pomerantz and a separate motion to exclude certain of his models.[15] *See ECF Nos. 114, 129*. The *Wildman* case further illustrates the risks associated with proving losses associated with the failure to monitor investments, as the district court concluded that the plaintiffs failed to prove loss based on the damages models of the

[14] In the *Putnam* case that this Court recently tried, the defendants also were initially the prevailing party before the case was remanded for further proceedings. *See Putnam*, 907 F.3d at 30.
[15] At the time the parties reached a settlement-in-principal, these motions remained pending. The Court did not rule on the motions until the morning that the Parties filed their Notice of Settlement.

same expert. *See Wildman*, 362 F. Supp. 3d at 710 (finding Dr. Pomerantz's models "did not use suitable benchmarks and relied on unfounded assumptions"). Although Plaintiffs believe that Dr. Pomerantz's loss models in this case were sound, these decisions illustrate that Plaintiffs faced risk with respect to damages as well as liability. *See* Restatement (Third) of Trusts, § 100 cmt. b(1) (2012) (noting that determination of investment losses in breach of fiduciary duty cases is "difficult"). This further supports approval of the Settlement in this case. *See Hill*, 2015 WL 127728, at *9; *Kemp-DeLisser v. Saint Francis Hospital and Medical Center*, 2016 WL 6542707, at *9 (D. Conn. Nov. 3, 2016).

C. ERISA Class Cases Are Complex, Expensive, and Often Lengthy

Aside from these risks, continuing the litigation would have resulted in complex and costly additional proceedings, which would have significantly delayed any relief to Class Members, and might have resulted in no relief at all. These considerations also support approval of the Settlement.

It is well-recognized that "ERISA is a complex field that involves difficult and novel legal theories and often leads to lengthy litigation." *Krueger v. Ameriprise*, 2015 WL 4246879, at *1 (D. Minn. July 13, 2015); *see also Abbott v. Lockheed Martin Corp.*, 2015 WL 4398475, at *2 (S.D. Ill. July 17, 2015) (noting that ERSIA 401(k) cases are "particularly complex"); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 138 (S.D.N.Y. 2010) ("Many courts have recognized the complexity of ERISA breach of fiduciary duty [actions]."). In fact, it is not unusual for ERISA 401(k) cases to extend for a decade or longer before final resolution. *See Tussey v. ABB Inc.*, 2017 WL 6343803, at *3 (W.D. Mo. Dec. 12, 2017) (requesting proposed findings more than ten years after suit was filed on December 29, 2006); *Tibble v. Edison Int'l*, 2017 WL 3523737, at *15 (C.D. Cal. Aug. 16, 2017) (outlining remaining issues ten years after suit was filed on August 16, 2007); *Abbott*, 2015 WL 4398475, at *3 (noting that the case had originally been filed on "September 11, 2006").

This case has already been pending for nearly two years, and although trial was set to begin

in July 2020, it is impossible to predict how long any appellate proceedings or subsequent proceedings would have taken. As the *Putnam* litigation demonstrates, ERISA 401(k) cases can take many different twists and turns. One of the chief benefits of the Settlement is that it avoids further delay and expense. *See Roberts*, 2016 WL 8677312, at *6; *In re StockerYale*, 2007 WL 4589772, at *3. Given the risks, cost, and delay of further litigation, it was in the best interest of the Class to reach a settlement on the terms that were negotiated. *See Kruger v. Novant Health, Inc.*, 2016 WL 6769066, at *5 (M.D.N.C. Sept. 29, 2016) ("[S]ettlement of a 401([k]) excessive fee case benefits the employees and retirees in multiple ways."); *Hill*, 2015 WL 127728, at *7 (defendants' "vigorous" defense and the delay in any potential recovery for class members supported approval of settlement); *In re Lupron,* 228 F.R.D at 95 (favoring settlement due to the burden that complex litigation places on the parties).

D. The Case Was Ripe for Settlement

There is no question that the case was ripe for settlement. Simply put, "this is not a case where the bulk of the attorneys' time was spent on negotiations." *In re Relafen,* 231 F.R.D. at 73. The Settlement occurred only after Class Counsel conducted a thorough investigation, prepared a detailed complaint (and three amended complaints), drafted a comprehensive set of discovery requests, repeatedly met and conferred with Defendants during the course of discovery, filed a motion to compel discovery, reviewed over 151,000 pages of documents and extensive class data produced by Defendants, produced over 32,000 pages of documents, responded to interrogatories, deposed nine fact witnesses, defended the depositions of all four Named Plaintiffs, engaged four experts and reviewed their expert reports, defended the depositions of Plaintiffs' experts, deposed Defendants' three expert witnesses, extensively briefed and argued a request for a jury, filed a joint stipulation for class certification, filed a motion for partial summary judgment and responded to Defendants' motion for summary judgment, appeared for an in-person hearing on the motions for

summary judgment, appeared for an in-person case stated hearing, filed a Daubert motion, responded to Defendants' Daubert motions, responded to Defendants' motion to bifurcate the trial, and prepared drafts of numerous pre-trial filings. *See Declaration of Kai Richter in Support of Plaintiffs' Motion for Attorneys' Fees and Costs, Administrative Expenses, and Class Representative Service Awards ("Second Richter Decl."), ECF No. 254, ¶ 18*. "Class counsel has consistently and vigorously been preparing for trial, which, were this Court to reject the Settlement, would commence in the near future." *In re Relafen Antitrust Litig.*, 231 F.R.D. at 73. In light of the full record that was developed, the Parties were clearly able "to make an intelligent judgment about settlement." *Bezdek*, 79 F. Supp. 3d at 348.

Courts in this district have approved settlements where the proceedings were much less advanced. *See Eaton Vance*, No. 18-12098, ECF No. 32, at 14 (noting that motion to dismiss was pending at the time of settlement); *In re StockerYale*, 2007 WL 4589772, at *3 (settlement before class certification was warranted based on discovery conducted and counsel's internal investigation prior to filing the case). The advanced stage of proceedings here objectively demonstrates that the settlement negotiations were fully informed and strongly supports approval of the Settlement. *See Hill*, 2015 WL 127728, at *5, *8 (finding extensive document production and depositions over more than two years to be sufficient discovery); *Bussie v. Allmerica Fin. Corp.*, 50 F. Supp. 2d 59, 77 (D. Mass. 1999) (finding that extensive discovery and retention of experts before settlement was probative of the settlement's fairness).

E. The Independent Fiduciary and the Class Members Support the Settlement

The positive responses from the Independent Fiduciary and the Settlement Class also support the Settlement. After completing the review required by Paragraph 2.2 of the Settlement and applicable law (*see supra* at 7 n.9), the Independent Fiduciary approved the "Settlement terms, including the scope of the release of claims, the amount of cash received by the Plan, the non-

monetary consideration and the amount of any attorneys' fee award or any other sums to be paid from the recovery," finding them to be reasonable. *Third Richter Decl. Ex. A at 1.* Moreover, the Named Plaintiffs previously submitted declarations in support of the Settlement, *see ECF Nos. 244-247*, and there has been only one objection out of 41,281 Class Members who were sent a Notice. *See supra* at 6-7. The fact that there were "a *de minimus* number of objections" and "none challenged the amount of the Settlement" constitutes "strong evidence of fairness of the proposed settlement and supports judicial approval." *Hill*, 2015 WL 127728, at *8 (quotation omitted).

The lone objection that was received does not challenge the merits of the Settlement. Instead, the objection is based on the fact that "there is no opt-out option" under the Settlement. This objection fails to recognize that the class in this case was certified under Rule 23(b)(1), *ECF No. 83 at ¶¶ 8-9*, consistent with numerous other ERISA cases that have been certified as (b)(1) classes. *Id. at n.1* (citing cases); *see also ECF No. 250 at ¶ 3* (preliminary approval order affirming certification for settlement purposes). It is well-established that there is no right to opt-out of a (b)(1) class. *See* Fed. R. Civ. P. 23(c)(2), (c)(3) (providing right of exclusion for (b)(3) class but not (b)(1) or (b)(2) classes); *Roy*, 353 F. Supp. 3d 43, 59 n.6 ("[U]nder Fed. R. Civ. P. 23(b)(1) … membership in the class is 'mandatory' and 'the Rule provides no opportunity for (b)(1) … members to opt out ....'") (quoting *Dukes*, 564 U.S. at 362); *Hochstadt v. Bos. Sci. Corp.*, 708 F. Supp. 2d 95, 104-05 (D. Mass. 2010). Accordingly, this objection should be overruled. *See Rivero Souss v. Banco Santander S.A.*, 2011 WL 13350165, at *6 (D.P.R. June 9, 2011), *report and recommendation adopted*, 2011 WL 13350166 (D.P.R. June 17, 2011) ("Contrary to objector BLP's arguments, … certification of non-opt-out classes under Rules 23(b)(1) … is entirely common and appropriate.").[16]

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[16] *See also Serio v. Wachovia Sec., LLC*, 2009 WL 900167, at *7 (D.N.J. Mar. 31, 2009) (overruling objections based on the fact that the class "was certified as a no opt-out class"); *In re*

F. The Ability of Fidelity to Withstand a Greater Judgment Is Not a Reason to Withhold Approval of the Settlement in Light of the Other Factors

Finally, although Fidelity has considerable assets, this "defendant oriented" factor is neutral where the Defendant has "deep pockets." *In re Relafen*, 231 F.R.D at 73 (quoting *In re Lupron*, 228 F.R.D. at 97); *see also Hill*, 2015 WL 127728, at *10 ("[A] defendant is not required to empty its coffers before a settlement can be found adequate[.]") (quotation omitted). Because the other *Grinnell* factors weigh heavily in favor of the Settlement, it should be approved notwithstanding the financial wherewithal of Fidelity. *See Hill*, 2015 WL 127728, at *10 (citing *D'Amato v. Deutsche Bank*, 236 F.3d 78, 86 (2d Cir. 2001)).

III. THE NEGOTIATIONS WERE CONDUCTED AT ARM'S LENGTH AND THE CLASS WAS ADEQUATELY REPRESENTED

The process by which the Settlement was reached also was fair, reasonable, and adequate. As the Court noted in its Preliminary Order, "the Settlement Agreement has been negotiated in good faith at arms-length between experienced attorneys familiar with the legal and factual issues of this case." *ECF No. 250, ¶ 2*. Further, a settlement was only reached after vigorous litigation on the merits and extensive discovery. *See supra* at 15-16. Accordingly, the Settlement is entitled to a presumption of fairness. *See Roberts*, 2016 WL 8677312, at *5 *("[T]here is a presumption in favor of the settlement if the parties negotiated it at arms-length, after conducting meaningful discovery.") (quoting *In re Tyco*, 535 F. Supp. 2d at 259; *City P'ship,* 100 F.3d at 1043).

Further, both the Named Plaintiffs and Class Counsel have adequately represented the interests of the Class. *See ECF No. 253 at 14-15* (setting forth Class Counsel's extensive experience and qualifications); *id. at 19-20* (explaining Named Plaintiffs' contributions over two years of litigation). This Court has previously found them adequate to represent the Class. *See ECF*

Am. Family Enterprises, 256 B.R. 377, 416-17 (D.N.J. 2000) (overruling objection that "designating [the] action as a mandatory class [was] unconstitutional").

No. 83 (order granting class certification); *ECF No. 250 at ¶¶ 4-5* (preliminary approval order).

IV. THE NOTICE OF SETTLEMENT WAS REASONABLE

The class notice program also was reasonable and satisfied the requirements of Rule 23 and Due Process. The "best notice" practicable under the circumstances includes "individual notice to all [class] members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). That is precisely the type of notice that was provided here.

As noted above, the Settlement Administrator sent the Court-approved Notices of Settlement to Class Members via U.S. Mail. *See supra* at 6. This type of notice is presumptively reasonable. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985); *accord Boyajian v. California Products Corp.*, 2013 WL 3828804, at *1 (D. Mass. July 9, 2013) (finding notice via U.S. mail "fully satisfied the requirements of Federal Rule of Civil Procedure 23 and the requirements of due process"). Further, the record reflects that approximately 98.04% of Notices of Settlement were successfully delivered. *See Mitchell Decl. ¶ 13*. This confirms the effectiveness of the notice program in this case. *See Hill*, 2015 WL 127728, at *1 (where a "substantial majority" of class members receive notice, the notice process is sufficient under Rule 23); *Gulbankian v. MW Mfrs., Inc.*, 2014 WL 7384075, at *4 (finding that notice reaching 80.1% of class members was reasonable).[17] In addition, the notices were accessible to all class members online via the Settlement Website. *See Bezdek*, 79 F. Supp. 3d at 336 (in addition to first-class mailing, an online portion of the notice program supports the adequacy of the notice). Finally, the content of the Notices also was reasonable.[18] These Notices were previously approved by the Court, *see ECF*

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[17] "Individual notice of class proceedings is not meant to guarantee that every member entitled to individual notice receives such notice." *Reppert v. Marvin Lumber & Cedar Co.*, 359 F.3d 53, 56 (1st Cir. 2004) (quotation omitted). It is sufficient that "the notice ordered is reasonably calculated to reach the absent class members." *Id.* (quotation omitted).

[18] The Notices included, among other things: (1) a summary of the lawsuit; (2) a clear definition of the Settlement Class; (3) a description of the material terms of the Settlement; (4) a disclosure

No. 250 ¶ 8, and are more than sufficient to meet the Rule 23 standard. *See Bezdek*, 79 F. Supp. 3d at 336; *Gulbankian*, 2014 WL 7384075, at *4; *see also In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 204 (D. Me. 2003) (Notice satisfies Rule 23 if it provides class members information to "make an informed and intelligent decision about whether to file a claim . . . or object to the proposed settlement."). Notably, no Class Member has claimed that the Notices were deficient, and to the extent they had any questions, they could review the Settlement Website, call the toll-free telephone line, or contact the Settlement Administrator or Class Counsel.

V. THE SETTLEMENT CLASS IS CONSISTENT WITH THE CLASS PREVIOUSLY CERTIFIED

Finally, the class definition in the Settlement is consistent with the class previously certified by the Court. The only differences are that the current class definition includes an end date for the Class Period, and explicitly identifies the persons with responsibility for the Plan's investment and administrative functions who are excluded from the Settlement. *Compare Settlement Agreement ¶ 1.11, with ECF No. 83* (order certifying class). The fact that the class for settlement purposes is consistent with the class that the Court approved for litigation purposes further supports approval of the Settlement. The Court previously affirmed this class definition in its preliminary approval order, *see ECF No. 250 at ¶ 3*, and should do so again on final approval.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court grant final approval of the Settlement and enter the accompanying proposed order.

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of the release of claims; (5) instructions for how Former Participant Class Members may submit a Former Participant Class Member Claim Form; (6) instructions as to how to object and a date by which Class Members must object; (7) the date, time, and location of the Fairness Hearing; (8) contact information for the Settlement Administrator; and (9) information regarding Class Counsel and the amount of attorneys' fees they would seek. *See Mitchell Decl. Exs. 1 & 2.*

Respectfully Submitted,

Dated: December 29, 2020

NICHOLS KASTER, PLLP

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CERTIFICATE OF SERVICE

I hereby certify that on December 29, 2020, a true and correct copy of the foregoing was served by CM/ECF to the parties registered to the Court's CM/ECF system.

Dated: December 29, 2020

s/Kai Richter
Kai Richter